STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Amy Ronayne Krause, Elizbeth L. Gleicher and Anica Letica

DAVID R. SANDERS and HEATHER H. SANDERS,

Plaintiffs-Appellees,

-vs-

TUMBLEWEED SALOON, INC.,

Defendant-Appellant,

and

SHAWN SPOHN and ZACHARY PIERCE, and PAINTER INVESTMENTS, INC., doing business as CHAUNCEY'S PUB,

Defendants.

Supreme Court Docket No. _____

Court of Appeals No. 338937

Montmorency Circuit Court
Lower Court Case No.: 16-003949-NO

DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

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JUDGMENT OR ORDER APPEALED FROM

Defendant-Appellant Tumbleweed Saloon, Inc., (hereinafter referred to as "Tumbleweed") seeks leave to appeal from the October 30, 2018, 2-1 Decision of the Court of Appeals in which the Court reversed the Trial Court's order granting defendants' motion for summary disposition. Attached as **Exhibit "A"** is a copy of the Court of Appeals Opinion. Attached as **Exhibit "B"** is a copy of the Trial Court's Opinion and Order.

Tumbleweed respectfully requests that this Honorable Court grant its Application for Leave to Appeal, reverse the Court of Appeals 2-1 Decision, and direct the Trial Court to enter an order granting summary disposition in favor of the Defendant. In the alternative, Tumbleweed requests that this Court enter an order reversing the decision of the Court of Appeals for the reasons stated in the Dissenting Opinion authored by Judge Elizabeth Gleicher.

STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR WHEN IT REVERSED THE TRIAL COURT'S ORDER GRANTING DEFENDANT SUMMARY DISPOSITION BECAUSE THE PLAINTIFF VIOLATED THE 120 DAY NOTICE PROVISION OF MICHIGAN'S DRAMSHOP ACT?

Plaintiffs-Appellees say…… "No"

Defendant/Appellant says..…… "Yes"

A. Did the Court of Appeals err when it found that there was no attorney-client relationship between the plaintiffs and their first attorney, when the attorney wrote to the defendant Tumbleweed (Highway Bar) and clearly and unequivocally stated that he represented the plaintiff as a result of the injuries he sustained at the bar?

Plaintiffs-Appellees say…… "No"

Defendant/Appellant says..…… "Yes"

B. Did the Court of Appeals err when it found that there was no attorney-client relationship, when the law is that there is no requirement for a retainer agreement to be signed or that an agreement for payment of attorney fees is in place, for an attorney-client relationship to be formed?

Plaintiffs-Appellees say…… "No"

Defendant/Appellant says..…… "Yes"

C. Even assuming, for the sake of argument, that the plaintiffs did not retain their first attorney, did the Court of Appeals err because the plaintiffs' attorney was estopped by the Michigan Rules of Professional Conduct from denying such a relationship after he made affirmative, clear, and unequivocal representations of such an attorney-client relationship in his letter to defendant?

Plaintiffs-Appellees say…… "No"

Defendant/Appellant says..…….. “Yes”

D. Did the Court of Appeals err when it ignored the “No-Contradiction Rule” and considered the attorney’s self-serving affidavit, when it was wholly inconsistent with the clear and unequivocal statements he previously made to defendant?

Plaintiffs-Appellees say…….. “No”

Defendant/Appellant says..…….. “Yes”

STATEMENT REGARDING APPELLATE JURISDICTION

This Court has jurisdiction to review and grant the Application for Leave to Appeal under MCR 7.205(B)(1), which allows this Court to grant Leave to Appeal from an Order of the Michigan Court of Appeals. This Court's jurisdiction has been timely and properly invoked as evidenced by the Court of Appeals' Opinion reversing the Trial Court's grant of summary disposition. The Court of Appeals' Opinion, along with the 10 page Dissenting Opinion, dated October 30, 2018, is attached hereto as **Exhibit "A".** The trial court's Opinion and Order granting summary disposition to the defendants, dated June 1, 2017, is attached hereto as **Exhibit "B".**

GROUNDS FOR SUPREME COURT RELIEF

The plaintiff in this case, David Sanders, alleges that he was assaulted by the co-defendants, Shawn Spohn and Zachary Pierce, outside of the co-defendant Chauncey's Pub. He filed a dramshop case against defendant-appellant, Tumbleweed Saloon, Inc. (also referred to as the Highway Bar), alleging that Spohn and Pierce were served alcoholic beverages after they displayed visible signs of intoxication at the Tumbleweed Saloon, prior to the fight. [1]

Under Michigan's Dramshop Act, MCL 436.1801(4), a plaintiff "shall give written notice to all defendants within 120 days after entering an attorney-client relationship for the purpose of pursuing a claim. . . ."

In this case, the plaintiffs' first attorney, Samuel Meklir, sent a representation letter to Tumbleweed (Highway Bar) in which he stated in affirmative, clear and unequivocal terms that **"I represent Mr. David Sanders as a result of the injuries he sustained while at the Highway Bar which occurred on December 2, 2014."** It is not disputed that if, in fact, Samuel Meklir, "represent [ed] Mr. David Sanders as a result of injuries he sustained while at the Highway Bar which occurred on December 2, 2014", that, at the latest, the plaintiff would have to have sent a written notice that the plaintiff was pursuing a claim under the Dramshop Act, pursuant to MCL 436.1801(4), at the latest, within 120 days after the date of the retention letter, that is, by June 3, 2015. It is undisputed but that the plaintiff did not do so.

Accordingly, if the representations made by attorney Meklir in his retention letter

[1] Plaintiff Heather Sanders was named as a plaintiff in the complaint, however, the only claim pleaded on her behalf was in Count VII of the plaintiffs' complaint, which is a wholly derivative claim, for loss of consortium. Accordingly, when the defendant referred to the singular "plaintiff," it is referring to David Sanders.

of February 3, 2015 (**Exhibit "C"**) are accepted as true, the plaintiff's would have violated the 120 day notice provision and the defendants would be entitled to summary disposition.

In an effort to circumvent this black letter law, the plaintiffs, in response to the motion, submitted an affidavit of attorney Samuel Meklir (attached as **Exhibit "D"**). In a self-serving affidavit, attorney Meklir claimed that, despite the letter that was sent to the defendant, he did not, actually, represent the plaintiffs. Despite attorney Meklir's attempts to "bob and weave" around the fact that he made representations to the defendant that he represented the plaintiffs and, was, indeed, representing them for this lawsuit, the retention letter sent by Mr. Meklir should be juxtaposed to the affidavit, signed later by Mr. Meklir in response to the motion.

> Letter from Samuel Meklir (**Exhibit "C"**):
>
> Dear Sir/Madam:
>
> **Please be advised that I represent Mr. David Sanders as a result of injuries he sustained while at the Highway Bar [Tumbleweed] which occurred on December 2, 2014.**
>
> **I understand that you have a videotaping system** that would have recorded the activities, which occurred and during which, Mr. Sanders was injured.
>
> We believe that the video evidence, which is in your possession, would be critically important.
>
> We would ask that the tapes, discs, or digital storing device the events are kept on, be preserved and not subject to spoliation.
>
> **Our firm would be willing to view the information at your convenience.**
>
> I thank you in advance for your cooperation.
>
> Very truly yours,
>
> Samuel A. Melkir

- Affidavit of Samuel Meklir (**Exhibit "D"**) in relevant part:

> AFFIDAVIT OF SAMUEL A. MEKLIR
>
> SAMUEL A. MEKLIR, being first duly sworn, deposes and states:
>
> ***
>
> 8. **At no time did I ever represent the Sanders regarding the personal injury claim that involved the assault on Mr. Sanders.**
>
> Further, Affiant sayeth not.
>
> */s/ Samuel A. Meklir*
> Samuel A. Meklir

Clearly, the Affidavit was prepared and signed in an effort to avoid the application of the clear law, which requires an attorney to provide written notice to the defendant within 120 days after entering into an attorney-client relationship for the purpose of pursuing a claim under the Dramshop Act.

This Court has applied the clear language of the 120 day rule, despite other attempts to circumvent the rule. For example, in *Langrill v Stingers Lounge,* 471 Mich 926 (2004) the plaintiff violated the 120 day notice rule. The plaintiff's argument in that case was that the attorney was retained for the sole purpose of pursuing an auto negligence claim, rather than a dramshop claim. This Court held that **"there is a presumption that the attorney-client relationship she entered into with her first attorney, who filed the original complaint in this matter, included the purpose of pursuing a claim under MCL 436.1801.**" *Langrill*, at 926 (emphasis supplied). The holding by the majority in the Court of Appeals is in conflict with *Langrill* as well as other holdings from this Court and other published, Court of Appeals cases.

The other cases involve dramshop cases that arise out of motor vehicle accidents. Those cases present greater challenges to plaintiffs' attorneys because it is not always clear where the at-fault driver had been drinking. In the instant case, since it involves a fight outside of a bar, the plaintiffs knew since day one what bars were potentially involved. In this case, unlike the others, there is a clear and unequivocal statement from an attorney indicating that he is representing the plaintiffs for the injuries sustained as a result of the injuries he sustained in a fight outside of the bar. The Majority Opinion in the Court of Appeals is sanctioning unethical conduct by an attorney, since the attorney in this case, was not truthful and he has made a misrepresentation of fact, in violation of MRPC 7.1(a) and MRPC 4.1. Either the statement in the letter that he was representing the plaintiff is true, or the statement in the affidavit, that he was not representing the plaintiff, is true. They both cannot be true. The Majority Opinion held that the letter is consistent with "carelessness or a unilateral act." As the Dissenting Judge noted, "that is a stretch, in my view." In point of fact, the Dissent is being kind.

Attempts by litigants to file subsequent affidavits in order to avoid the application of clear law is becoming more prevalent in Michigan in recent years. It is an affront to the rule of law. Litigants are commonly filing affidavits so that judges, such as the Majority in this case, find that there is a "question of fact", precluding application of the law. That is even more egregious in the instant case, since the witness submitting the affidavit is an attorney, rather than a litigant. An attorney is an officer of the court. The record demonstrates that the affidavit submitted in this case, which was relied upon by the Majority in the Court of Appeals, is an obvious and blatant attempt to circumvent the will of the Legislature, which enacted the 120 day notice rule.

MCR 7.302(B)(3) provides that one of the grounds for this Court to grant an Application for Leave to Appeal is if it involves legal principles of major significance to this state's jurisprudence. Defendant submits that this Court has not dealt with this recurring problem, which threatens the integrity of the law, by not applying clear statutes enacted by the Legislature. This case is unique in that it not only presents issues involving a clear statutory requirement under Michigan's Dramshop Act, MCL 436.1801, but also involves issues of attorney ethics, that is, the effect of affirmative, clear and unequivocal statements made by a claimant's attorney in a letter to a potential defendant and what effect the attorney's filing of a wholly inconsistent subsequent affidavit, in a blatant misstatement to defeat the motion, has on this state's jurisprudence.

If the Court of Appeals Majority Opinion stands, it will give the "green light" to such conduct in the future. It will send a signal to the bar that if there is a statutory provision that has been violated, the attorney can simply submit an affidavit to render the statute inapplicable. It will render the 120 day notice provision impotent, since an attorney can violate the statute, but later submit an affidavit stating the exact opposite of what the attorney previously represented. It may also implicate other areas of the law, requiring notice, such as governmental immunity, medical malpractice, etc. The Dissenting Judge stated it succinctly as follows:

> Despite claiming to represent David Sanders in the letter, and in the same breath requesting access to video evidence, Meklir's affidavit asserts the opposite—that he actually refused to represent plaintiffs after meeting them. Meklir's dodging and weaving does not create a *material* fact question regarding the legal issue at the heart of this dispute. When considering the material evidence, reasonable minds could not differ as to the ultimate conclusion that as a matter of law, Meklir and plaintiffs entered into an attorney-client relationship for the purpose of pursing a dramshop action.

Dissenting Opinion, p 8 (emphasis in the original).

This case involves the lower court's refusal to apply clear statutory law, but it also involves, at least by implication, the Court of Appeals approval of the actions taken by the plaintiffs and their attorneys in an attempt to defeat the motion for summary disposition. That has significant public policy implications.

An alternative ground for granting an Application for Leave to Appeal, pursuant to MCR 7.302(B)(5), is a case in which the decision by the Court of Appeals is clearly erroneous and conflicts with either a Supreme Court decision or another decision from the Court of Appeals. This case also falls into that category. It conflicts with this Court's decision in *Langrill v Stingers Lounge,* 471 Mich 926 (2004) as well as the Court of Appeals decisions in *Lautzenheiser v Jolly Bar & Grill,* 206 Mich App 67 (1994) and *Chambers v Midland Country Club,* 215 Mich App 573 (1996). These cases all dealt with the rule that there is a presumption that an attorney-client relationship was formed for the purpose of pursuing a claim, under the Dramshop Act. In those cases, which were all motor vehicle negligence cases, the plaintiffs' attorneys all claimed that they were originally retained to represent their client strictly with respect to a motor vehicle accident claim, and not to pursue a dramshop claim. The instant case presents a much more compelling case for summary disposition, since the plaintiff's attorney sent a letter to the bar confirming that he was representing the plaintiff and requesting access to a videotape of the assailants in the bar, prior to the fight. Reasonable minds could not differ but that that letter was stating that Meklir represented the plaintiff and that he was investigating a case against the bar.

As indicated, the practice of submitting disingenuous affidavits in order to create

an issue of fact is becoming more and more common. What was done in this case is substantively indistinguishable from the practice of submitting post-deposition affidavits to defeat summary disposition, which Michigan courts have long held is not permissible. *Kaufman & Payton, P.C. v Nikkila,* 200 Mich App 250 (1993). The legitimacy of this practice is of major significance to the way in which the law is applied in this state.

Defendant submits that the Court of Appeals Majority clearly erred when rendering its decision. The reasoning employed by the Trial Court and Dissent was correct. Judge Gleicher, the Dissenting Judge, would have granted summary disposition to defendant. She recognized the folly of the Majority Opinion.

The defendant also requests that this Honorable Court grant its Application for Leave to Appeal in order to save the parties and Trial Court the cost and expense of going through a lengthy trial with numerous witnesses, which will be expensive for all parties. Statutes are meaningless if an attorney can simply submit a post hoc affidavit, which renders the statute nugatory.

Accordingly, the defendant-appellant Tumbleweed Saloon, Inc., respectfully requests that this Honorable Court grant its Application for Leave to Appeal and reverse the Court of Appeals 2-1 decision. In the alternative, the defendant-appellant requests that this Court enter an order peremptorily reversing the decision of the Court of Appeals, for the reasons stated in the Dissenting Opinion.

STATEMENT OF FACTS

The plaintiffs, David and Heather Sanders, filed an eight count complaint against two individuals and two corporate defendants. The two corporate defendants operate two bars, which are down the street from one another. In Counts I and II, the plaintiffs claimed that defendants Shawn Spohn and Zachary Pierce assaulted David Sanders in the early evening hours of December 2, 2014, outside of Chauncey's Pub on the public street after the two had first patronized the pub and then the Tumbleweed Saloon (also known as the "Highway Bar") located diagonally across the street from the pub. The plaintiffs' complaint is attached as **Exhibit "E".** In Counts III and IV, the plaintiffs claim that, prior to the assault, Tumbleweed and Chauncey's Pub furnished alcohol to Spohn and Pierce (the "allegedly intoxicated persons", under the Dramshop Act, hereinafter referred to as the "AIP's") while visibly intoxicated in contravention of the Dramshop Act, MCL 436.1801. Counts V, VI, and VII allege that Chauncey's was negligent or grossly negligent in its training and maintenance of employees and the premises, which resulted in the injuries to Mr. Sanders. The only claim against Tumbleweed is the claim of a violation of the Dramshop Act.

The only claim made by plaintiff Heather Sanders is in Count VIII of the Complaint, which is a derivative claim for loss of consortium. Heather Sanders was not injured in the fight. Her injuries consist of the loss of consortium, society and companionship. Paragraph 68 of the plaintiffs' Complaint, **Exhibit "E"**. Heather Sanders admitted that she was not injured in the fight. She testified as follows:

Q. You weren't injured, were you?

A. No.

Ms. Hodek: I'd object to the use of the word "injured"

Q. Were you physically injured?

A. No.

Testimony of Heather Sanders, pp 68-69, **Exhibit "F".**

Prior to retaining their current counsel, plaintiffs were represented by attorney Samuel Meklir. Meklir sent the retention letter to Tumbleweed (**Exhibit "C"**). Meklir uncategorically states in the letter "that I represent Mr. David Sanders as a result of injuries he sustained while at the Highway Bar which occurred on December 2, 2014." **Exhibit "C".** He asks Tumbleweed (Highway Bar) to retain any video evidence that it may have. He further indicates that "our firm would be willing to view the information at your convenience," referring to the video evidence. The letter does not say that Meklir has represented plaintiffs in the past. The letter does not say that he may represent the Sanders in the future. It is in the present tense. It affirmatively states **"I represent Mr. David Sanders as a result of the injuries he sustained while at the Highway Bar."** (emphasis supplied). The letter does not make mention of any potential dramshop action against Tumbleweed. It does not identify the AIPs, despite their identities having been known and documented in the police report. It does not inform Tumbleweed that it is alleged that the bar furnished alcohol to the AIPs while they were visibly intoxicated. Mr. Sanders testified that he learned of the names of Spohn and Pierce as his assailants within a week of the incident (see deposition transcript of David Sanders, pp 40 and 44,

attached as **Exhibit "G"**).[2] Thus, there is no question that Meklir knew or should have known the identities of the AIPs prior to the date he sent his retention letter.

The Trial Court, after reviewing the evidence, issued its Opinion and Order (**Exhibit "B"**). The court found that, although Meklir, in his affidavit, stated that he at no time represented the Sanders, the letter he sent indicated otherwise. The Trial Court noted that Meklir used the word "represent" in his letter to the defendant, which is an indication that he was actively representing the plaintiff as of the date of the letter. The Trial Court, Judge Michael Mack, also noted the following testimony from plaintiff Heather Sanders:

> Q. . . Did you and David retain another attorney in Southfield to initially pursue this action?
>
> A. That was my original lawyer.
>
> ***
>
> Q. Who was that?
>
> A. Sam Meklir.

Trial Court Opinion, **Exhibit "B"**, p 3.

The Trial Court found that the conduct of the parties demonstrates that an attorney-client relationship existed at the time the retention letter was sent by Meklir. Summary disposition, therefore, was granted to the defendants.

The Majority in the Court of Appeals spoke of immaterial facts in this case, that do not have a bearing on the issue in question. Judge Gleicher, in her Dissent, recapitulated the material facts in full. Plaintiff David Sanders was involved in a fight outside of

[2] Judge Gleicher included the relevant testimony from the plaintiffs in her Dissenting Opinion. Defendant would refer the Court to that Dissenting Opinion for the testimony given by the plaintiffs.

Chauncey's Pub. The plaintiffs allege that his two assailants, the AIPs, were served alcoholic beverages after they displayed visible signs of intoxication at both Tumbleweed and Chauncey's. Tumbleweed filed a motion for summary disposition based, not only the 120 day notice violation, but also based upon the evidence that had been elicited, demonstrating that plaintiffs could not be meet their burden that the AIPs were served alcoholic beverages at Tumbleweed. Tumbleweed also argued that the plaintiffs failed to produce evidence that actions of the Highway Bar were the proximate cause of the plaintiff's injuries. Since the violation of the 120 day notice rule was so clear to the Trial Court, the court granted the motion for summary disposition based upon the 120 day notice provision, but declined to rule on the other issues. Accordingly, the only issue presented to this Court is whether the Court of Appeals erred in the finding that the plaintiffs did not violate the 120 day notice provision.

ARGUMENT

I. THE COURT OF APPEALS ERRED WHEN IT REVERSED THE TRIAL COURT'S ORDER GRANTING DEFENDANTS SUMMARY DISPOSITION BECAUSE THE PLAINTIFFS VIOLATED 120 DAY NOTICE PROVISION OF MICHIGAN'S DRAMSHOP ACT, MCL 436.1801(4).

The Dramshop Act was amended in 1986 to require that a plaintiff seeking damages under the Act gave written notice to all potential defendants of the possibility of a claim within 120 days after entering into an attorney-client relationship. MCL 436.1801(4) provides, in pertinent part:

> A plaintiff seeking damages under this section shall give written notice to all defendants within 120 days after entering an attorney-client relationship for the purpose of pursuing a claim under this section. Failure to given written notice within the time specified shall be grounds for dismissal of the claim as to any defendants that did not receive such notice. . . .

The fight in question occurred on the December 2, 2014 (plaintiffs' Complaint, **Exhibit "E")**. Plaintiffs' original attorney, Samuel Meklir sent a letter to the Highway Bar on February 3, 2015. See copy of letter, **Exhibit "C"**. This letter proves that the plaintiffs had entered into an attorney-client relationship by February 3, 2015, at the latest.

The defendant did not receive the statutorily required dramshop notice until November 30, 2015. A copy of that letter is attached hereto as **Exhibit "H"**. The statutory dramshop notice was sent by the plaintiffs' current attorney. Defendant does not dispute that, although the notice was not timely received, the content of the notice complied with the requirements of the Dramshop Act. It stated that the plaintiffs were pursuing a potential claim pursuant to the Dramshop Act, MCL 436.1801. It identified the two AIPs,

Shawn Spohn and Zachary Pierce. It specifically notes that it is a dramshop notice filed pursuant to the dramshop statute.

Since it is clear that the plaintiffs had entered into an attorney-client relationship, at the latest, on February 3, 2015, the statutorily required notice of dramshop claim would have been due, at the latest, 120 days from that date, or by June 3, 2015. The dramshop notice was not received, as indicated, until November 30, 2015. It is clear, therefore, that the statutorily required dramshop notice was not provided within 120 days after entering into an attorney-client relationship for the purpose of pursuing a claim.[3]

The 120 day notice provision is mandatory. *Brown v Jo Jo-Ab, Inc,* 191 Mich App 208 (1991). The Act requires dismissal of a dramshop suit in the event that notice is not timely provided. *Chambers v Midland Country Club,* 215 Mich App 573 (1996). A showing of prejudice by the dramshop defendant as a result of the plaintiff's non-compliance with the notice provision is not necessary. *Brown, supra.*

The one exception to the rule is if the potential plaintiff can show that sufficient information for determining that a bar might be liable was not known and could not reasonably have been known within 120 days of entering into the attorney-client relationship. That exception usually comes into play in a dramshop case involving a motor vehicle accident. In such cases, a plaintiff may not be able to ascertain where the other, at-fault driver had been drinking. Oftentimes there is a criminal prosecution and the police may not release copies of their investigation because a criminal matter is pending. This exception does not apply to a dramshop case involving a bar fight or a fight outside of a

[3] The statutorily required notice of dramshop claim must, at a very minimum, provide notice to the defendant of the plaintiff's intent to pursue an action under the Dramshop Act, against the notified defendant. *Auto-Owners Ins. Co. v Olympia Entertainment, Inc*., 310 Mich App 132, 167 (2015).

bar. As in this case, it was well known to the plaintiffs within a week after this incident, who the AIPs were and where they were, obviously drinking.

A. The Court Of Appeals Erred When It Found That There Was No Attorney-Client Relationship Between The Plaintiffs And Their First Attorney, When The Attorney Wrote To The Defendant Tumbleweed (Highway Bar) and Clearly And Unequivocally Stated That He Represented The Plaintiffs As A Result Of The Injuries That He Sustained At The Bar.

The issue in this case is whether the plaintiff entered into an attorney-client relationship with attorney Meklir on or before he sent the retention letter, **Exhibit "C"**. As indicated above, this is not a situation where the plaintiffs did not or could not know where the AIPs had been drinking. That was clear. The plaintiffs drove from their home in northern Michigan to meet with attorney Meklir at his office in Southfield. The Court of Appeals Majority found that, despite the uncategorical evidence, i.e., the retention letter, there was no attorney-client relationship for the purpose of pursuing a claim under the Dramshop Act between Meklir and the plaintiffs. The defendant has pointed out how the representations contained within Meklir's letter and the representations made by Meklir under oath, in his affidavit, are hopelessly irreconcilable. When confronting that issue, the Court of Appeals Majority stated:

> Here, the sworn, testimonial evidence unequivocally establishes that plaintiffs and Meklir never arrived at a "meeting of the minds" for Meklir to represent them in any way. Meklir's use of the word "represent" in his letter might reasonably be construed to the contrary. However, **it might also be construed as carelessness or a unilateral act.**

Majority Opinion, at p 6 (emphasis supplied).

The Majority claims that Meklir's simple statement that he represented the plaintiff may have simply been "carelessness." Attorneys are bound by their actions. If it was "carelessness", then perhaps the plaintiffs have an action against their attorney. When there is a clear and unequivocal statement by an attorney that he represents the plaintiff

for the injuries he sustained while at the defendant's bar, the defendant has the right to expect that, indeed, the attorney does represent the plaintiff for the injuries he sustained at the bar. Whether it was careless or not is irrelevant.

Whether it was a "unilateral act" is also irrelevant. A client is bound by the representation of his attorney. If the attorney makes a representation or offer that he is not authorized to make then, again, the plaintiff may have an action against an attorney, but the statement is nevertheless binding on the client.

The following facts cannot be disputed. As the Dissenting Judge pointed out, the "plaintiffs visited him not to engage in idle chit-chat, but to obtain legal advice." Dissenting Opinion, p. 8. There is no question but that Meklir sent a letter to the defendant clearly and unambiguously stating that he was representing the plaintiff. Meklir clearly and unambiguously stated that he was representing him for injuries sustained at the defendant's bar. Meklir asks about evidence, i.e., any video that may have recorded what happened in the bar that night. Meklir is obviously interested in that evidence, since he indicates that he would like to take a look at that video. The plaintiff's suggestion that this was simply a coffee klatch among friends, is not supported by the evidence. Moreover, the relevant question is not what was in the minds of the plaintiffs, not what was in the mind of Meklir, but rather, what a reasonable person would believe upon receipt of the letter. Clearly, reasonable minds could not differ but that the defendant understood from the letter that Meklir had an attorney-client relationship with the plaintiff as a result of the injuries he sustained at the bar.

The Majority in the Court of Appeals claim that the letter "is at the most ambiguous or completely dependent upon Meklir's and plaintiffs' credibilities, which precludes

summary disposition." Further, the Majority states in footnote 8, that "the courts have long rejected slavishly applying talismanic meanings to words. See *In Re Traub Estate*, 354 Mich 263, 278-279; 92 NW 2d 480 (1958)." Majority Opinion, p 7. Defendant believes that the Majority clearly erred when so holding. The letter sent is not ambiguous. It is not "completely dependent" upon the credibility of Meklir or the plaintiffs. The Majority then cites *In Re Traub Estate*, which involved this Court's interpretation of a provision in a contract. The Majority basically stated that they were "rejecting slavishly applying talismanic meanings to words", when interpreting the sentence "please be advised that I represent Mr. David Sanders as a result of injuries he sustained while at the Highway Bar which occurred on December 2, 2014." If the attorney's words mean what they say they mean, it is fanciful to suggest that the statement that the attorney was representing the plaintiff for the injuries he sustained at the bar, is "slavishly applying talismanic meanings to words." In point of fact, the statement in Meklir's letter is clear, unequivocal and easily understood even by a lay person.

Plaintiffs in other cases have attempted to evade application of the 120 day notice provision by making similar arguments, which have all been rejected by both this Court and the Court of Appeals. The plaintiffs in those cases had stronger arguments, since they involved motor vehicle accident cases, in which the plaintiffs may not have known where the alleged intoxicated person was drinking. The seminal case is *Langrill v Stingers Lounge,* 471 Mich 926 (2004). In that case, the plaintiff argued that he was retained solely to prosecute an auto negligence claim, not a dramshop action, and that, therefore, he should be excused from providing the statutory notice within 120 days after first entering into an attorney-client relationship. The plaintiff first entered into an agreement with his

attorney to simply pursue the auto negligence claim. Once it was learned where the at-fault driver was drinking, there was a second representation agreement entered into and the statutorily required notice was given. The Court of Appeals held that, since the agreement was simply to prosecute an auto negligence claim, the 120 day notice period did not begin to run on the date of the initial representation agreement. Rather, it began to run on the date the second representation date was entered into.

This Court summarily reversed the Court of Appeals. This Court held that there is a presumption that the attorney-client relationship is entered into with the plaintiff's first attorney. This Court held:

> [W]e vacate the judgment of the Court of Appeals and remand this matter to the Macomb Circuit Court for further proceedings. Because plaintiff did not present any evidence to the contrary, **there is a presumption that the attorney-client relationship she entered into with her first attorney**, who filed the original complaint in this matter, included the purpose of pursuing a claim under MCL 436.1801. *Chambers v Midland Country Club,* 215 Mich App 573 (1996).

Langrill, at 926. (Emphasis supplied).

The plaintiff in the instant case has nothing to rebut the presumption. In fact, all of the evidence is to the contrary; that is, that there was an attorney-client relationship entered into for the purpose of pursuing a claim. As indicated, in *Langrill*, there was a specific provision in the retainer agreement between the plaintiff and her first attorney indicating that she was only retained to prosecute the auto negligence case. This Court held that such evidence was not enough to rebut the presumption. If that evidence was not enough to rebut the presumption, then certainly the plaintiff has not presented, in the instant case, evidence to rebut that presumption.

The Court of Appeals has similarly rejected plaintiffs' attempts to circumvent the notice provision. In *Chambers v Midland Country Club,* 215 Mich App 573 (1996), the plaintiff argued that the 120 day notice rule should not be applied because, during discovery, there was testimony and evidence that the AIP was not served at the defendant country club. Therefore, they argued that he was justified in not supplying timely notice to the defendant country club. The Court held that the plaintiff was not relieved from providing notice, since notice is required even if the bar **might** be liable under the Dramshop Act. *Chambers,* at 576. The *Chambers* Court further held that if there is evidence that the plaintiff entered into an attorney-client relationship following the accident, there would be a presumption that the attorney-client relationship was for the purposes of pursuing a dramshop claim.

The instant case provides a more compelling argument for summary disposition than the facts in *Chambers*. In this case, the Meklir letter, **Exhibit "C"**, proves that there was an attorney-client relationship. The letter proves that the relationship was entered into as a result of the injuries the plaintiff sustained at the bar. The letter proves that the attorney was attempting to obtain evidence to support such a claim. The presumption is not necessary, since all of the admissible and material evidence is that there was such an attorney-client relationship. When the presumption is applied on top of that, it becomes clear that there was such an attorney-client relationship and that proper notice was not given.

The Court of Appeals in *Lautzenheiser v Jolly Bar & Grill,* 206 Mich App 67 (1994) also held that it was irrelevant (1) whether plaintiff's counsel was originally retained for the specific purpose of pursuing a dramshop claim and (2) that plaintiff may not have had

all of the facts to prove a dramshop claim, if the plaintiff had sufficient information that would create the possibility of a dramshop claim. *Lautzenheiser* makes clear that it is irrelevant whether the specific purpose of forming the attorney-client relationship was for the purpose of pursuing a dramshop claim. Even if all of the facts were not known, notice must be given if the bar might be held liable. Again, the facts of the instant case unambiguously demonstrate that there was such an attorney-client relationship entered into and that Tumbleweed **might** be liable under the Dramshop Act.

B. <u>The Court Of Appeals Erred When It Found That There Was No Attorney-Client Relationship, When The Law Is That There Is No Requirement For A Retainer Agreement To Be Signed Or An Agreement for Payment of Attorney Fees Is In Place, For An Attorney-Client Relationship To Be Formed.</u>

In Meklir's affidavit, **Exhibit "D"**, he indicates that he was doing plaintiffs "a favor," that he never represented the Sanders regarding the personal injury claim involving the assault and that no retainer agreement was ever drafted or signed regarding the incident. Whether those averments are true or not, they are irrelevant. The Court of Appeals Majority acknowledges that there was a duty of confidentiality. Majority Opinion, p 5. The Majority claims that an attorney-client privilege does not mean that there is an attorney-client relationship. A reasonable person, upon receiving the Meklir letter, would certainly believe that there was an attorney-client relationship. If Meklir had disclosed confidential information as a result of his meeting with the plaintiffs, that certainly would be a violation of ethical principles.

There need not be a formal retainer agreement for there to be an attorney-client relationship. There does not need to be an agreement as to the payment of attorney fees for there to be an attorney-client relationship. In fact, any act on the part of an attorney indicating that he represents the client is treated as an appearance on behalf of that party, under the Michigan Court Rules. MCR 2.117 states, in relevant part:

> B) Appearance by Attorney.
>
> (1) *In General.* **An attorney may appear by an act indicating that the attorney represents a party in the action.** An appearance by an attorney for a party is deemed an appearance by the party. Unless a particular rule indicates otherwise, **any act required to be performed by a party may be performed by the attorney representing the party**.

(Emphasis supplied).

The Court of Appeals Majority seems to indicate that the plaintiff is relieved from providing the statutorily required notice because attorney Meklir may not have been authorized by the plaintiffs to send the retention letter. The Court Rules make clear, however, that there does to have to be anything done, in a formal way, for an attorney to begin representing a party. "An act indicating that the attorney represents a party" is enough to establish an attorney-client relationship. "It is a universal rule that an attorney-at-law is presumed to have authority to represent a party litigant for whom he appears." *August v Collins,* 265 Mich 389, 396 (1933).

No formal contract is required for there to be an attorney-client relationship. As the Dissent pointed out, "[t]he employment is sufficiently established when it is shown that the advice and assistance of the attorney are sought and received in matters pertinent to his profession." *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Sch*, 455 Mich 1, 11 (1997). This Court in *Macomb Co Taxpayers Ass'n* went on to hold the following:

> The operative principle in the Court of Appeals ruling is that an obligation to pay for legal services is the sine qua non of an attorney-client relationship. This is simply untrue. "The relation of attorney and client is one of confidence based upon the ability, honesty and integrity of the attorney," *Haskins v Bell,* 373 Mich 389, 391; 129 NW2d 390 (1964), not solely, or even primarily, upon a client's obligation to pay. The rendering of legal advice and legal services by the attorney and the client's reliance on that advice are those services is the benchmark of an attorney-client relationship. The attorney's right to be compensated for his advice and services arises from that relationship; it is not the definitional basis of that relationship.

Macomb Co Taxpayers Ass'n, at 10-11.

This Court has held that a lawyer who advises a litigant is his attorney. A formal appearance is not necessary. *Omdahl v West Iron Co Board of Ed,* 478 Mich 423, 428 (2007).

The United States Supreme Court approved and transmitted to Congress in 1972 the Federal Rules of Evidence, which included among the lawyer-client privilege rules (which were eventually eliminated by Congress), the following definition:

> **A "client" is a person**, public officer, or corporation, association or other organization or entity, either public or private, **who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.**

(Emphasis supplied).

The Supreme Court of Iowa, in *Kurtenbach v Tekippe,* 260 NW 2d 53 (Iowa 1977), held the following with respect to an attorney-client relationship:

> An attorney-client relationship ordinarily rests on contract, but it is not necessary that the contract be express or that a retainer be requested or paid. The contract may be implied from conduct of the parties. *Healy v Gray,* 184 Iowa 111, 168 NW 2d 222 (1918). **The relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.**

Kurtenbach, at 56 (emphasis supplied).

In the instant case, there can be no dispute but that Meklir gave the plaintiffs advice or assistance. Meklir is a personal injury attorney; that is why the plaintiffs traveled to Southfield to seek his advice and assistance.

In determining the existence of an attorney-client relationship, the inquiry considers the client's subjective belief that he is consulting the attorney in a professional capacity

and "the client's intent to seek the attorney's professional legal advice." *People v Crockran,* 292 Mich App 253, 258-259 (2011).

An attorney attempted to disassociate himself with a letter he wrote on behalf of a client, in *Greycas, Inc v Proud,* 826 F 2d 1560 (7th Cir 1987). The plaintiff sued defendant Proud, an attorney, for legal malpractice. The plaintiff was attempting to secure a loan. The plaintiff was required, under the contract, to obtain a letter from an attorney stating that he conducted a UCC Search and that there were no prior liens on the machinery that was used secure the loan. Defendant Proud was asked to do the letter. The defendant, on his letterhead, stated that "I have been asked to render my opinion in connection with" the proposed loan. The plaintiff alleged that the defendant attorney sent the letter, indicating that there were no liens, when in fact, there were liens. The plaintiff sued the defendant attorney for the misrepresentation. The defendant lawyer's defense, similar to the arguments posed by the plaintiffs in the instant case, was that he was not retained by the plaintiff. Rather, he was doing him a favor. The Court held that "**by addressing a letter** to Greycas intended (as Proud's counsel admitted at argument) **to induce reliance on the statements in it, Proud made himself prima facie liable for any material misrepresentations, careless or deliberate, in the letter, whether or not Proud was not Crawford's lawyer or for that matter anyone's lawyer**." *Greycas,* at 1564. (Emphasis supplied).

A similar argument was raised by the defendant attorney in the case of *George v Caton,* 93 N.M. 370, 600 P 2d 822 (1979), another legal malpractice case. In that case, the defendant attorney did not file suit within the statute of limitations. His defense was

that he had no attorney-client relationship with the plaintiff. The New Mexico Court held as follows:

> No formal contract, arrangement or attorney fee is necessary to create the relationship of attorney and client. *Westinghouse Elec Corp v Kerr-McGee Corp,* 580 F 2d 1311 (7th Cir 1978); *Farnham v State Bar,* 17 Cal 3d 605, 131 Cal Rptr 661, 552 P 2d 445 (1976); *Kurtenbach v TeKippe,* 260 NW 2d 53 (Iowa 1977); *Alexander v Russo,* 1 Kan App 2d 546, 571 P 2d 350 (1977); *Tormo v Yormark,* 398 F Supp 1159 (DNJ 1975); *Crest Investment Trust, Inc. v Comstock,* 23 MD App 280, 327 A 2d 891 (1974); *Bresette v Knapp,* 121 VT 376, 159 A 2d 329 (1960); *Lawrence v Tschirgi,* 244 Iowa 386, 57 NW 2d 46 (1953); *Nicholson v Shockey,* 192 VA 270, 64 SE 2d 813 (1951).
>
> The contract may be implied from the conduct of the parties. *Kurtenbach, supra; Lawrence, supra.*
>
> ***
>
> A professional relationship exists though the services may be rendered gratis. *Allman v Winkelman,* 106 F 2d 663 (9th Cir, 1939), cited in *Westinghouse, supra*. In other words, a contingent fee arrangement is not an essential term of a contract that establishes an attorney-client relationship.

George, at 827-828.

The fact that a client is bound by the actions of his lawyer is a generally accepted legal principle. Justice Zahra, in his recent Dissenting Opinion on a denial of an Application for Leave in the case of *McNeill-Marks v MidMichigan Medical Center-Gratiot,* 502 Mich 851 (2018), summarized the law with respect to attorney-client relationships as follows:

> The attorney-client relationship is generally governed by agency law. The legal definition of "attorney" is "one who is designated to transact business for another; a legal agent." **An attorney** (agent) **acts on behalf of the client** (principal), **representing the client, with consequences that bind the client.** "A lawyer is an agent, to whom clients entrust matters, property, and information, which may be of great importance

> and sensitivity, and whose work is usually not subject to detailed client supervision because of its complexity." In civil cases, a client is bound by an attorney's actions and omissions as long as the attorney's conduct falls within the scope of the attorney's authority. An attorney acting outside the scope of his authority may open himself up to civil liability and professional sanctions. Agency law imparts many duties that an agent owes a principal. But attorneys are held to a higher standard and thus have heightened duties compared to the ordinary agent.

(Dissenting Opinion in *McNeill-Marks, supra,* at p 8 of Slip Opinion) (Emphasis supplied).

In Justice Zahra's Dissent in *McNeill-Marks,* in footnote 43, he lists cases in which the client was bound by his lawyer's actions. The Dissent stated:

> *Link v Wabash R Co,* 370 US 633-634 (1962) (affirming the district court's dismissal of the action when the petitioner's lawyer failed without reasonable excuse to appear for pretrial conference and noting that "[p]etitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent."); *New York v Hill,* 528 US 110, 114-115 (2000) (holding that defense counsel, as the defendant's agent, could waive the defendant's right to trial within a statutory period, even without the defendant's express consent); *Detroit v Whittemore,* 27 Mich 281, 286 (1873) ("The employment of counsel does not differ in its incidents, or in the rules which govern it, from the employment of an agent in any other capacity or business."); *People v Carter,* 462 Mich 206, 218 (2000) ("[T]he defendant is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.") (quotation marks and citation omitted); *AMCO Builders & Developers, Inc. v Team Ace Joint Venture,* 469 Mich 90, 103 (2003) (Young, J., Concurring) ("The attorney-client relationship is generally governed by principles of agency."; *People v Dendel,* 481 Mich 114, 137 (2008) (Corrigan, J., Concurring) ("[L]awyers are *agents*, after all. . . ." (quotation marks and citation omitted).

Dissenting Opinion, *McNeill-Marks, supra,* at p 16 of Slip Opinion.

Numerous Michigan cases, as well as cases across the country, stand for the proposition that a client is bound by the actions of his attorney. The Majority Opinion in the Court of Appeals notes that the plaintiffs claim that they did not authorize Meklir to send the letter in question. That is irrelevant. That has been held repeatedly as the law both in Michigan and across the country. If the plaintiff suffers an adverse result of because of an action by an attorney, then the client's recourse is against the attorney. For example, in *Prater v Game Time, Inc,* 134 Mich App 669 (1984) the plaintiff redeemed his workers' compensation case. The plaintiff claimed that he had breathing problems as a result of being exposes to fumes while at work. His doctor examined him and diagnosed with emphysema. The plaintiff claimed that he did not know that his doctor had diagnosed him with emphysema until after he had redeemed his workers' compensation case. He therefore attempted to set aside the redemption (settlement). The Court of Appeals would not set aside the redemption, holding as follows:

> Plaintiff claimed that he had no knowledge of Dr. Newman's diagnosis of emphysema until after he had already redeemed defendants' liability. However, plaintiff's attorney was well aware of Dr. Newman's diagnosis, since Dr. Newman appeared as plaintiff's witness. An attorney acts as an agent of his client. *Fletcher v Board of Education of School Dist Function No. 5,* 323 Mich 343, 348; 35 NW 2d 177 (1948). As an agency relationship exists between the two, a plaintiff is charged with the knowledge of his attorney. *Geel v Goulden,* 168 Mich 413, 419-420; 134 NW 484 (1912). Consequently, even if plaintiff did not have actual knowledge of the emphysema diagnosis prior to settling his compensation claim, plaintiff cannot know assert that this information was new or unavailable to him.

Prater, at 675-676.

The Majority Opinion also notes that the plaintiffs may not have authorized Meklir to send the letter. Under Michigan law, that, too, is irrelevant. The Court of Appeals in

Slocum v Littlefield Public Schools Board of Education, 127 Mich App 183 (1983), was presented with the exact issue. The Court of Appeals held:

> Finally, petitioner argues that the respondent did not authorize its attorney to send the letter notifying the commission of her extended probation and that notice is, therefore, invalid. An attorney often acts as an agent for his client. *Fletcher v Fractional No. 5 School Dist,* 323 Mich 343, 348; 35 NW 2d 177 (1948). **An agent's authority**, however, **is not limited by what he is authorized to do expressly by his principal….**

Slocum, at 194 (emphasis supplied).

The Majority Opinion in the instant case is antithetical to what is widely accepted in law, that is, lay people have the right to expect that when an attorney states that he is acting on behalf of a client, that the attorney is, indeed, acting on behalf of the client and has authority to do so. The United States Supreme Court recognized that in *Link v Wabash Railroad Co,* 370 US 626 (1962). In that case, the Court scheduled a pretrial conference. The petitioner's attorney failed to appear at the pretrial conference. The trial court dismissed the case. In reviewing the dismissal, the United States Supreme Court held as follows:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. **Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."**

Link, at 633-634 (emphasis supplied).

In the instant case, the Dissenting Judge in the Court of Appeals correctly noted that the plaintiffs' claim that they did not specifically authorize Meklir to send the letter is irrelevant. Meklir was acting on behalf of the plaintiffs. Any reasonable person receiving the Meklir retention letter would believe that. The plaintiffs attempts to muddy the record by filing a clearly false affidavit should not be condoned.

Finally, the plaintiffs argue in their appellate brief that even if the 120 day notice provision acts to bar the case of David Sanders, it does not bar the case of Heather Sanders. The plaintiff references the Meklir letter, which only references David Sanders. Plaintiff further claims that Heather Sanders has an independent cause of action, even though she sustained no physical injuries.

Such an argument is misplaced. The only cause of action pleaded by Heather Sanders was in Count VIII of the Complaint, Exhibit E, in which Heather Sanders alleges only a derivative cause of action for loss of consortium, based upon her husband's injuries. Even if it is assumed, for sake of argument, that Heather Sanders did have some type of independent cause of action, she never pleaded that cause of action in her complaint. Accordingly, since it was not pleaded, defendant could not file a motion on it and the trial court could not rule on whether such a claim stated a claim upon which relief can be granted.

MCR 2.111 states, in relevant part:

> (B) Statement of Claim. A complaint, counterclaim, cross-claim, or third-party complaint must contain the following:
>
> > (1) A statement of facts, without repetition, on which the pleader relies in stating the cause of action, **with the specific allegations reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend. . . .**

(Emphasis supplied).

There was no pleading indicating that plaintiff Heather Sanders was making an independent claim under the Dramshop Act. The defendant relied upon the complaint that was filed, that is, that plaintiff David Sanders sustained physical injuries and that Heather Sanders' only claim was a derivative one for loss of consortium.

A complaint must provide reasonable notice to the defendant as to what cause of action the plaintiff is claiming. *Simonelli v Cassidy,* 336 Mich 635 (1953); *Jean v Hall,* 364 Mich 434 (1961); *Scott v Cleveland,* 360 Mich 322 (1960); *Dacon v Transue,* 441 Mich 315 (1992).

The Court Rule, as well as the case law, is clear. In those cases, there were close questions as to whether the plaintiff adequately pleaded with enough specificity in the complaint to inform the defendant of what was being claimed. In the instant case, the plaintiffs failed to plead an entire cause of action. Such an argument, therefore, should not be considered by the Court.

C. Even Assuming, For The Sake Of Argument, That Plaintiffs Did Not Retain Their First Attorney, The Court Of Appeals Erred Because The Plaintiffs' Attorney Was Estopped By the Michigan Rules Of Professional Conduct From Denying Such An Attorney-Client Relationship After He Made Affirmative, Clear And Unequivocal Representations Of Such An Attorney-Client Relationship In His Letter To The Defendant.

The averments in the affidavit submitted by attorney Meklir are wholly inconsistent with the representations made by Meklir in his letter to the defendant. The Dissent pointed those out. Plaintiffs should not be able to dodge the statutorily imposed notice requirements by making false and untruthful statements or averments in contravention of the Michigan Rules of Professional Conduct.

MRPC 7.1 states, in relevant part:

> A communication shall not:
>
> (a) contain a material misrepresentation of fact or law, or omit a fact necessary to make the statement considered as a whole not materially misleading. . . .

As noted, Meklir's letter and Meklir's affidavit cannot both be true. Either one or the other contained a misrepresentation of fact, which has now been authorized and approved by the Court of Appeals Majority Opinion. This is important for the jurisprudence of the state of Michigan and should not stand.

MRPC 4.1 states:

> In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.

Again, accordingly to Meklir's affidavit, he made a misstatement of fact to a third person, i.e., to the Tumbleweed Saloon. He represented to the Tumbleweed that he was

representing the plaintiff. He now claims that, in fact, he was not representing the plaintiff at the time. In the comment section to that rule, it is noted that "a lawyer is required to be truthful when dealing with others on a client's behalf." Again, according to attorney Meklir, his letter to the defendant was not truthful. The Court of Appeals Majority has held, in the instant case, that there was no lawyer-client relationship. If that was, indeed, true, then attorney Meklir was prohibited from revealing the information that he revealed in the letter to the defendant. MRPC 1.18 states, in relevant part:

> (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

Thus, if there was no attorney-client relationship, attorney Meklir acted unethically by sending the letter and disclosing such information to the defendant. The defendant should no be penalized for such behavior. If, in fact, there was no attorney-client relationship, Meklir had a duty to inform defendant that there was no such relationship. If his retention was somewhat limited, he had a duty to inform the defendant of that limitation. In the comment section to MRPC 1.18, it is stated:

> For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response.
>
> ***
>
> (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

The actions taken by the plaintiffs in response to the motion for summary disposition are, to put it mildly, unseemly. Providing false affidavits in order to create issues of fact, in order to avoid the application of the will of the Legislature, has, in effect, now been authorized as a result of the Court of Appeals Majority Opinion. Courts need to apply the law as written. Litigants need to follow the law, without making up false testimony in order to defeat a motion. Most importantly, attorneys should not be allowed to submit false affidavits in attempts to create questions of fact.

D. The Court Of Appeals Erred When It Ignored the "No-Contradiction Rule" And Considered the Attorney's Self-Serving Affidavit, When It Was Wholly Inconsistent With The Clear And Unequivocal Statements He Provided In The Letter To The Defendant.

The subsequent affidavit filed by Meklir should not have been considered by the court. A party or witness may not create a factual dispute by submitting an affidavit which contradicts his own prior conduct or sworn testimony. *Palazzola v Karmazin Products Corp,* 223 Mich App 141, 155 (1997); *Aetna Casualty & Surety Co v Ralph Wilson Plastics Co,* 202 Mich App 540, 548 (1993). The Dissenting Judge noted that Michigan case law holds that a witness may not create a factual disputing by submitting an affidavit that contradicts his prior testimony. *Dykes v William Beaumont Hosp,* 246 Mich App 471 (2001). The Dissent would also hold that "a question of fact cannot be created by an affidavit completely at odds with a witness's recorded words, whether sworn or not—particularly when the sworn testimony offers no explanation for the prior statement. The trial court reached the same conclusion." Dissent, p 8 of Slip Opinion.

It is particularly unsavory when such an affidavit is propounded by an attorney. As the Dissent points out, there is no explanation given by Meklir as to why the averments he makes in his affidavit are the exact opposite of what he represented to the defendant in his letter. Whether it is testimony or the actions of a witness, or any attorney, this type of tactic has been used more and more recently by the Bar. It is this Court, as the highest court in the state, that must send a signal to the lower courts and the Bar that such tactics cannot be used to create an issue of fact, which the Court of Appeals Majority did in the instant case.

The "no contradiction rule" was applied to an issue involving an attorney submitting an affidavit in order to avoid a summary disposition motion in *Kaufman & Payton, P.C. v Nikkila,* 200 Mich App 250 (1993). In that case, an attorney submitted such an affidavit, which was inconsistent with his testimony. The Court of Appeals held:

> The principle, as discussed in *Griffith v Brant,* 177 Mich App 583; 442 NW 2d 652 (1989), and *Peterfish v Frantz,* 168 Mich App 43; 424 NW 2d 25 (1988), is not limited to *parties* who make contradictory assertions. **The principle that contradictory affidavits should be disregarded stands irrespective of the identity of the maker of the conflicting statements.** Even if the *Griffith-Peterfish-Downer* principle is somehow limited, **a party is bound by representative admissions of counsel. Neither a party nor that party's legal representative make contrive factual issues by relying on an affidavit** when unfavorable deposition testimony shows that the assertion in the affidavit is unfounded.

Kaufman & Payton, at 257 (emphasis supplied).

The "no contradiction rule" has not only been applied to attorneys, but it has also been applied to affidavits that have been submitted which contradict interrogatory answers. In *Atkinson v City of Detroit,* 222 Mich App 7 (1997), the court found that the "no contradiction rule" applies equally if the affidavit submitted is contradictory to prior interrogatory answers.

It may sometimes be a "close call" as to whether the affidavit is truly contradictory to prior statements or actions taken by a party or witness. In the instant case, there is no such nuance. The Meklir letter stated that he represented the plaintiff. In the Meklir affidavit, he stated that he did not represent the plaintiff. Nothing could be clearer. "[W]hen a party makes statements of fact in a clear, intelligent, unequivocal manner, they should be considered as conclusively binding against him in the absence of any explanation or

modification, or of a showing of mistake or improvidence." *Barlow v John Crane-Houdaille, Inc,* 191 Mich App 244, 250 (1991). In the instant case, the plaintiffs have offered no explanation or modification of these two statements.

The "no contradiction rule" applies to conduct and actions of a party or witness, not just prior testimony. The Court of Appeals in *Aetna Casualty & Surety Co v Ralph Wilson Plastics Co,* 202 Mich App 540 (1993) held that "[s]ummary disposition cannot be avoided by conclusory assertions that are at odds either with prior sworn testimony of a party or, as here, **actual historical conduct of a party.** *Gamet v Jenks,* 38 Mich App 719, 726; 197 NW 2d 160 (1972)." (Emphasis supplied). There is ample case law holding that the "no contradiction rule" applies to historical actions of a party or a witness. In addition, the actions or statements of an attorney are imputed to his client. The Dissenting Opinion understood that Meklir's "dodging and weaving" does not create a material fact question. Although that is correct, it was not just "dodging and weaving", but it was an outright statement in which he testified in his affidavit that he actually refused to represent the plaintiffs after meeting with them. This is much more than argument, or "dodging and weaving"; it is a misstatement.

CONCLUSION/RELIEF REQUESTED

If the Court of Appeals Majority Opinion is allowed to stand, then it will provide a roadmap to the Michigan Bar to show how an attorney can simply submit an affidavit, which is diametrically opposed to his prior statements and conduct, to the Court in order to create questions of fact in order to avoid summary disposition. That is not argument; it is lawlessness. In other words, it is a way to circumvent a statute, which was enacted by the Legislature for a purpose. For the above reasons, Defendant-Appellant Tumbleweed Saloon, Inc., respectfully requests that this Honorable Court grant its Application for Leave to Appeal so that these issues can be fully addressed and argued, or, in the alternative, to peremptorily reverse the decision of the Court of Appeals by adopting the Dissenting Opinion.

Respectfully submitted,

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